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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 490

IN THE MATTER

of

SIDNEY SARNER,
Charged With Criminal Contempt,

Appellant.

ON APPEAL FROM FINAL JUDGMENT OF
THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT AND MOTION FOR LEAVE TO PROCEED UPON RECORD IN PRIOR APPEAL WITH ALTERNATIVE PETITION FOR REHEARING OR ALTERNATIVE MOTION FOR RECALL AND AMENDMENT OF MANDATE

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Charged with Criminal Contempt,

Appellant.

ON APPEAL FROM FINAL JUDGMENT OF
THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO PROCEED UPON RECORD AND PAPERS IN PRIOR APPEAL

Sidney Sarner, the appellant in the above entitled appeal, which arises in the same matter as the appeal in No. 803 at the October Term, 1958, in this Court, respectfully says:

For the reasons fully set forth in the Jurisdictional Statement submitted for filing herewith, the present appeal in which said Jurisdictional Statement is submitted, involves, and presents anew, the issues of the aforementioned prior appeal in No. 803 at the preceding term, thus rendering it convenient and, appellant submits, necessary, to refer to the

record and the papers filed in the said prior appeal in No. 803.

Wherefore appellant respectfully prays and moves this Court for leave to proceed in the present appeal upon the certified record, appendices, and all other papers, including the Jurisdictional Statement, Motion to Dismiss, Reply Brief and Petition for Rehearing, filed in No. 803, October Term, 1958, which are supplemented in the present appeal by a supplemental certified record of the proceedings which have been had in this matter since the disposition of the said appeal in No. 803; and to authorize the Clerk to accept for filing the Jurisdictional Statement submitted herewith, which makes use of said record and papers in said prior appeal.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

IN THE MATTER

of

SIDNEY SARNER,
Charged with Criminal Contempt,

Appellant.

ON APPEAL FROM FINAL JUDGMENT OF THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Supreme Court of New Jersey, entered on September 29, 1959, denying a petition for certification (i.e., denying review) of an order of the Superior Court, Appellate Division of New Jersey, which denied an application for a stay of commitment for criminal contempt and for a rehearing of the judgment of conviction of contempt, and for other relief. Appellant is presently incarcerated in the Hudson County Jail, Jersey City, N. J., serving a sentence of sixty days, which began on September 30, 1959. Appellant submits

this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are properly presented.

Together with this Jurisdictional Statement, there is being filed in this Court a petition for rehearing of the judgment of this Court of May 25, 1959 (rehearing denied June 29, 1959), which dismissed a prior appeal by the present appellant (No. 803, October Term, 1958) in connection with the same conviction for criminal contempt. There is also being filed herewith a motion for recall and amendment of the mandate in the said prior appeal. The present Jurisdictional Statement, and the aforementioned petition for rehearing and motion to recall and amend the mandate which are being filed at the same time and are printed under single cover herein, are intended by the appellant as applications in this Court for relief in the alternative.

Appellant is also filing in this Court, together with this Jurisdictional Statement and printed herein, a motion for leave to proceed upon the certified record, appendices and all of the other papers filed in this Court in the aforementioned prior appeal which was No. 803 at the October Term, 1958. In addition, the appellant is filing herewith the certified record of the proceedings in the State courts subsequent to the dismissal by this Court of the prior appeal in No. 803 on May 25, 1959.

Opinions Below

Neither the Supreme Court of New Jersey nor the Superior Court, Appellate Division, wrote opinions in connection with the stage of this matter that is being brought here by the present appeal. The opinions which were pertinent to the prior appeal are cited and referred to at page 1

of our Jurisdictional Statement in the said prior appeal.* Copies of the pertinent judgments and orders of the Supreme Court of New Jersey and the Appellate Division, which were entered since the date of the remand to the State courts following the dismissal of the prior appeal, and which are involved in the present appeal, are printed herewith as Appendix A, *infra*.

Jurisdiction

(1) As fully explained *infra*, this appeal arises by reason of events partially post-dating this Court's dismissal of the prior appeal; and the posture of the matter is such (*infra*) that if the present appeal is entertained it would necessarily follow that the issues of the prior appeal, or some of them, would stand presented anew in this appeal. We therefore respectfully refer the Court to our Jurisdictional Statement in our prior appeal, pp. 1-3, where we set forth the jurisdictional basis for that appeal.

(2) The date of the judgment of the Supreme Court of New Jersey sought to be reviewed in this appeal is September 29, 1959. (App. A, p. 5a, *infra*). The Supreme Court of New Jersey is the highest court of that State. Notice of appeal was filed in that Court on October 16, 1959.

(3) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(2).

(4) Cases believed to sustain the jurisdiction in the prior appeal are cited in our Jurisdictional Statement in that

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* Appellant's aforementioned motion which is being filed herewith for leave to proceed on the record and papers in the appeal in No. 803, October term, 1958, prays that the Jurisdictional Statement, Appellant's Reply Brief and Petition for Rehearing in that appeal be treated also as part of the record in the present appeal.

appeal (p. 2). Cases believed to sustain the jurisdiction in the present appeal are *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, and *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, holding that a proper case for appeal is presented where the validity of a state statute, as construed and applied, is drawn in question on the ground of repugnancy to the federal Constitution; cases pertinent to the jurisdictional issues presented by the fact that the present appeal is, in one aspect, an appeal from a denial of an application for rehearing in the State courts, are cited and discussed under the heading "How THE FEDERAL QUESTIONS ARE PRESENTED", *infra*.

(5) The proceedings for criminal contempt which gave rise to the prior appeal and to this appeal, and which stemmed out of a matrimonial action in the Superior Court of New Jersey, Chancery Division—Bergen County, were brought and conducted pursuant to the provisions of R.R. 3:8, i.e., Revised Rule 3:8 of "The Revision of the Rules Governing the Courts of the State of New Jersey (1953)". This "Revision of the Rules" is an enactment of the Supreme Court of New Jersey having the force and effect of a statute under the Constitution of New Jersey (see pp. 18-19, of our Jurisdictional Statement in the prior appeal).

(6) Both in the prior appeal and in this appeal the validity of R.R. 3:8, as applied in this case to deny the appellant the right to a jury trial, to free speech and to adequate notice and hearing is involved. Related provisions of the Constitution, statutes, and "Revision of the Rules Governing the Courts" etc., of New Jersey, the constitutionality of which is not involved, but which have a bearing on the case, are Article I, paragraphs 9 and 10 of the Constitution of New Jersey (1947), relating to the right of trial by jury; Article I, paragraph 6 of the latter

Constitution, relating to liberty of speech; N.J.S. ("New Jersey Statutes"), Title 2A ("Administration of Civil and Criminal Justice"), Chapter 10, Sections 1 and 3 (officially cited as N.J.S. 2A:10-1 and 3), relating, respectively, to contempts of court in general, and appellate review of contempt convictions; R.R. 1:5-2, relating to appellate review of contempt convictions, together with R.R. 2:5, making R.R. 1:5-2 applicable to appeals taken to the Superior Court of New Jersey, Appellate Division; and R.R. 4:87, which sets forth in the "Rules of Civil Practice" of the aforementioned "Revision of the Rules" etc. provisions on contempt paralleling those of R.R. 3:8 (in the "Rules of Criminal Practice"). All of the provisions above mentioned were printed in Appendix B, in our Jurisdictional Statement in the prior appeal. In addition, the present appeal involves R.R. 1:9-4 and 2:9-2, which, aided by R.R. 1:27A, govern the filing of petitions for rehearing and allow relaxation of time therefor. (Not printed).

Questions Presented

The appellant, a layman, was convicted and sentenced to sixty days' imprisonment for criminal contempt. The alleged contempt consisted of oral statements in open court during a matrimonial action in which the appellant was the defendant spouse. The gravamen of the alleged contempt was disrespect to or criticism of the trial judge personally, not interference with or obstruction of the proceedings, which undisturbedly went on to completion. Not until three months and one week after his allegedly contemptuous conduct, and not until three months and six days after completion of the trial in the matrimonial proceeding, was the appellant cited for contempt therefor. The contempt proceedings (which took place another seventeen days later) were nevertheless conducted as though an emergency requiring immediate prophylaxis existed,

i.e., the contempt proceedings were conducted as summary proceedings for criminal contempt, without a jury, pursuant to R.R. 3:8. The incongruity of resort to summary procedures was underscored by the assignment of another judge to conduct the contempt proceedings, thus further belying any urgency in the situation and instead bespeaking its reposefulness. The contempt proceedings were conducted so summarily that the appellant had no effective opportunity to try the issue of intent or of the factual justification of the criticisms made by him which had resulted in the contempt citation. The record in the matrimonial action supports the view that legitimate triable issues of fact existed in those respects. Also, the appellant was not apprised until the time of the "hearing" that the contempt alleged was criminal in nature. On the basis of the foregoing there were presented in the prior appeal the following questions, which are presented also in this appeal:

1. Whether the decisions, or any decision, of this Court have reached a considered and settled conclusion that the Fourteenth Amendment to the Constitution of the United States imposes no requirement on any state to afford the right of jury trial in prosecutions for crime, or in prosecutions criminal in their nature; or whether, instead, the expressions contained in decisions of this Court which look to such a conclusion have all involved factual situations of a civil not criminal nature or situations of a criminal nature where the facts fall short of outright denial of the right of jury trial *in toto*.

2. Whether this Court is disposed in this appeal to reconsider its ruling in *Eilenbecker* v. *District Court*, 134 U. S. 31, that the federal Constitution does not require jury trial in prosecutions for criminal contempt in state courts.

3. Whether, if questions 1 and 2 present constitutional issues deemed to have vitality, R.R. 3:8 is unconstitutional as applied to the appellant in that it (a) permits denial of the right to jury trial in criminal contempt proceedings, (b) was applied so to deny jury trial to the appellant, and (c) thereby deprived him of liberty without due process of law and abridged his privileges and immunities as a citizen of the United States, in contravention of the Fourteenth Amendment.

4. Whether R.R. 3:8 is unconstitutional in that the summary powers it vests in the New Jersey state courts were applied to the appellant in such manner as to deny him adequate notice and hearing in contravention of the due process clause of the Fourteenth Amendment, the inadequacy consisting in this: (a) that the appellant was not adequately apprised as to the criminal nature of the contempt proceeding; and (b) that he was not afforded an adequate trial of the factual issues as to his guilt or innocence.

5. Whether, apart from the effect of R.R. 3:8 as set forth in question No. 4 above, the appellant was denied adequate notice and hearing in contravention of the due process clause of the Fourteenth Amendment.

6. Whether the matter on account of which the appellant was convicted was within the right of free speech protected by the Fourteenth Amendment, and whether such right was abridged.

7. Whether the denial of jury trial violated the Fourteenth Amendment guarantee of such trial with respect to issues of free speech.

This appeal in addition presents the following questions by reason of the fact that a certain representation made to this court by the Attorney General of New Jersey (see be-

low) in the prior appeal subsequently ought to have necessitated further proceedings in the New Jersey state courts by way of rehearing of the appellant's conviction for contempt, but such rehearing relief in the state courts having been denied in all respects:

8. Whether notwithstanding the fact that the appellant's prior appeal to this Court was dismissed on May 25, 1959 (rehearing denied June 29, 1959), the aforesaid questions 1 to 7, inclusive, are jurisdictionally and meritoriously a proper subject for the appeal instituted by this notice of appeal, in view of the following further facts which are believed by the appellant to have worked a further and renewed denial to him of due process of law under the Fourteenth Amendment of the Constitution of the United States with respect to the subject matter of the prior appeal:

(a) In the aforesaid prior appeal in this Court the Attorney General of the State of New Jersey represented to this Court in his motion to dismiss said appeal that under the law of New Jersey the appellant was entitled to introduce new evidence in the Supreme Court of New Jersey and in the Superior Court, Appellate Division, in the proceedings for review of his conviction for contempt.

(b) Such representation by the Attorney General of New Jersey is believed by appellant to have been a new, unprecedented and incorrect statement of the law of New Jersey and to have entitled the appellant, therefore, after this Court dismissed the aforesaid appeal upon papers embodying the aforesaid representation of the Attorney General, to apply to the courts of New Jersey for a reconsideration of his conviction for contempt for the purpose of either an opportunity to introduce new evidence in accordance with

the Attorney General's representation or to obtain an authoritative declaration from the highest court of the State repudiating the Attorney General's representation, such latter declaration being alternatively desired by the appellant with a view to bringing a new appeal to this Court in the event that rehearing or other relief were not granted to the appellant by the courts of New Jersey in the light of the aforementioned representation by the Attorney General.

(c) The appellant, having moved by petition for rehearing in the Superior Court, Appellate Division, seeking relief as aforesaid in the light of the Attorney General's representation, was denied any relief whatsoever by that Court and was ordered committed by a new warrant of commitment issued by that Court.

(d) The appellant having filed a petition for certification in the Supreme Court of New Jersey to review the aforesaid denial of relief by the Superior Court, Appellate Division, the appellant's said petition was denied by order entered September 29, 1959.

9. Whether, therefore, the refusal of rehearing relief in the State courts has in effect amounted to a new and additional constitutional aggrievement against the appellant, revisiting upon him anew the violations of his constitutional rights depicted in the above stated questions 1 to 7, in that the Attorney General of New Jersey had made a surprising and unprecedented representation to this Court in the prior appeal concerning the supposed status of the law of New Jersey on the question of the rights of a defendant in criminal contempt proceedings to have a *de novo* trial of fact in the state appellate courts; in that, further, this representation may have been instrumental in causing the dismissal of the prior appeal by this Court;

in that, further, the appellant, subsequent to the dismissal of the prior appeal by this Court, unsuccessfully petitioned the New Jersey State appellate courts to determine whether the said representation correctly states the law of New Jersey and to afford the petitioner a *de novo* trial of fact as aforesaid if the representation were deemed correct; and in that such applications for rehearing relief were denied without opinion and without any clarification whatsoever as to the status of the law of New Jersey on the issue of appellate trial *de novo* of fact in criminal contempt cases.

Statement of the Case

We shall not here repeat the Statement of the Case given in our Jurisdictional Statement in the prior appeal (pp. 5-13).

After this Court dismissed our prior appeal on May 25, 1959 and denied rehearing on June 29, 1959, the appellant moved in the state appellate courts of New Jersey for a rehearing of his contempt conviction, and for a stay of the warrant of commitment, on the following basis:

A principal issue in the prior appeal in this Court was whether the appellant was unconstitutionally denied a jury trial in the criminal contempt proceedings in the state courts. The Attorney General of New Jersey had represented to this Court in his motion to dismiss the prior appeal (p. 9) that the issues as to denial of jury trial and fair trial generally in this case were not significant because if the appellant had desired to introduce new evidence in the state court appeals from his criminal conviction he could have done so, i.e., could have obtained a literal trial *de novo* on the factual issues of his guilt or innocence. The Attorney General's representation to the above effect read:

"* * * had the appellant desired to introduce new evidence he could have sought leave to do so since the New Jersey Constitution gives the Appellate Division and the Supreme Court such original jurisdiction as is necessary to dispose of any case before it, * * *"

This statement by the Attorney General as to the status of the law of New Jersey was disputed by the appellant in his reply brief in the prior appeal in this Court (p. 15). In thereafter seeking rehearing of his contempt conviction in the State courts by reason of the Attorney General's aforesaid representation to this Court, appellant urged that the representation was either erroneous as a statement of the law of New Jersey, or, if correct, entitled the appellant to an opportunity to present new evidence on the issue of his guilt or innocence, because the status of the pertinent New Jersey statutory and case law was not such as to have led anyone, prior to the Attorney General's representation herein, to think that such a representation could be legally correct. In support of the application for rehearing in the State courts, appellant presented an analysis of all the pertinent State court decisions with a view to showing that the Attorney General's representation was either incorrect or called for an authoritative clarification of the law of this subject by the State appellate courts (all of the papers in the State appellate courts pertinent hereto are in the certified record filed herewith). The State appellate courts denied the appellant any rehearing relief (App. A, *infra*). It is that denial of relief which occasions the present appeal.

The proceedings in the state appellate courts in which the appellant was denied rehearing relief as above stated are described under the next heading.

How the Federal Questions Are Presented

We respectfully refer the Court once again to our Jurisdictional Statement in the prior appeal (pp. 13-18), where we showed how the federal questions involved in that appeal, and now sought to be brought forward again in this appeal, are presented.

In this appeal the new federal questions are presented as follows: The proceedings in the state appellate courts which have taken place since this Court's dismissal of the prior appeal and the denial of rehearing, commenced with the filing on July 14, 1959 in the Superior Court, Appellate Division, of a petition for stay of warrant of commitment and for relaxation of time for filing a petition for rehearing.* The latter petition did not include the text of the petition for rehearing which was proposed to be filed if leave therefor were granted, but summarized the grounds which could be urged therein, to wit, the grounds arising by reason of the Attorney General's aforementioned representation to this Court. The attorney assigned to the matter on behalf of the State filed an "Answer" in the Appellate Division on July 20, 1959, opposing the appellant's aforesaid petition of July 14, 1959, and urging only that the grounds offered by appellant presented nothing new in the case—which latter was wholly incorrect as shown in our "Reply to Answer, etc." (printed, buff cover), pp. 2-5; 12a-14a (see certified record filed in the present appeal). At that juncture, then, the Appellate Division had before it nothing more than a petition for relaxation of time to apply for rehearing, a petition for stay of

* The above mentioned petition and all other papers referred to in this statement of how the federal questions are presented are before this Court on this appeal as part of the certified record in the court below

commitment, and an opposing answer from the State along the lines above indicated—i.e., it is to be especially noted that the Appellate Division did not have before it at that juncture the text of the proposed petition for rehearing as such or any discussion by either party of the merits of the grounds of such proposed petition. On July 31, 1959 the Appellate Division denied, without opinion, the petition of July 14, 1959, in all things (App. A, *infra*). On August 20, 1959, appellant filed in the Appellate Division a typewritten petition for rehearing of the July 31 denial of the purely procedural petition of July 14, plus a printed proposed full petition for rehearing of the contempt conviction. On September 3, 1959, the Appellate Division entered an order which did not refer to the proposed printed full petition for rehearing, but denied the petition asking for reconsideration of the order of July 31, 1959, which had denied the purely procedural petition of July 14, 1959 (App. A, *infra*). The order of September 3, 1959 also directed that "a warrant of commitment * * * be issued forthwith that the sentence of the court may be carried out." Thereafter, the appellant filed a petition for certification in the Supreme Court of New Jersey to review the order of the Appellate Division of September 3, 1959. That petition for certification contained, as had the proposed petition for rehearing which was seemingly not covered by the Appellate Division's order of September 3, 1959, a full presentation of the appellant's contentions in terms of constitutional due process (federal and state) addressed to the situation created by the Attorney General's aforementioned representation to this Court in the prior appeal. The Supreme Court of New Jersey denied the petition for certification, without opinion, on September 29, 1959 (App. A, *infra*).

The appellant's contentions of denial of federal due process were explicitly stated in the proposed petition for

rehearing in the Appellate Division on p. 10 (questions presented, #4) and pp. 23-31 (Point II); and in the petition for certification at p. 1 (Questions Presented #4) and pp. 15-20 (Point II). See certified record in the present appeal.

While the Appellate Division may be said, perhaps, not to have entertained the proposed printed full petition for rehearing which was annexed to the papers filed in that Court by appellant on August 20, 1959, the Supreme Court of New Jersey had before it, in the petition for certification, a full statement of the appellant's federal constitution contentions as above shown, and by denying certification it necessarily rejected those contentions.

Appellant's theory that the present appeal properly presents new matter supporting such a second appeal is as follows: We argue *infra* that the Attorney General's representation to this Court which may have been instrumental in causing the dismissal of the prior appeal was either an incorrect statement of the law of New Jersey or a statement of such doubtful correctness as to require, in the circumstances of this particular case, an authoritative clarification by the highest state court. We submit further that the procedure which the appellant followed in his to cope with the difficulties created for him by the y General's representation, namely, an application fo aring in the Superior Court, Appellate Division (w e contempt conviction finally lodged under the New y procedure), followed by petition for certification in e Supreme Court of New Jersey, was a proper *de novo* exhaustion of state remedies in the particular procedural setting of this case.

As concerns the question of the timeliness of the appellant's rehearing application in the state courts during this last juncture of the case, under the State Rules of Court

(R.R. 1:9-4 and 2:9-2, aided by R.R. 1:27A) the requisite relaxation of time was within the power of the state courts to grant. As indicated above, while there may be doubt as to whether the Appellate Division "entertained" the petition for rehearing, there is no doubt that the Supreme Court of New Jersey entertained the petition for certification, which was ordered "denied", not "dismissed". Cf. *Sibbald* v. *The United States*, 2 How. 455, 457; *Bowman* v. *Loperena*, 311 U. S. 262, 266; Stern and Gressman, *Supreme Court Practice* (2nd Ed.), p. 164. The lapse of time involved in the institution of this latest rehearing proceeding in the state courts was not unreasonable in view of the intervening circumstance of the Attorney General's representation to this Court in the prior appeal. The present case is readily distinguishable in this last respect from *F. T. C.* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206, and it compares favorably with cases such as *F. A. R. Liquidating Corp.* v. *Brownell*, 223 F. 2d 128 (C. A. 3, 1955); *National Comics Publications* v. *Fawcett Publications*, 198 F. 2d 927 (C. A. 2, 1952); *United States Cartridge Co.* v. *Powell*, 186 F. 2d 611 (C. A. 8, 1951); *Epstein* v. *Goldstein*, 110 F. 2d 747 (C. A. 2, 1940); *Wichita Royalty Co.* v. *City Nat. Bank* 97 F. 2d 249 (C. C. A. 5, 1938), aff'd w. modif. 306 U. S. 103, prior op. 95 F. 2d 671; *Sanderson* v. *Postal Life Ins. Co.*, 72 F. 2d 894 (C. C. A. 10, 1934); *Clarke* v. *Boysen*, 273 Fed. 923, 925-926 (C. A. 8, 1921). Cf. also the liberal entertainment of successive petitions for rehearing, in the interests of justice, in *United States* v. *Ohio Power Co.*, 353 U. S. 98, reh. den. 353 U. S. 977; and of the motion addressed to the mandate in *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183.

It is submitted that the intervening circumstances which have caused the appellant to file this second appeal in this Court justify such course of proceeding by analogy to the cases in which rehearing is granted by reason of an inter-

vening change in the law applicable to the case. Cf. *Zap* v. *United States*, 330 U. S. 800; *Bradley Mining Co.* v. *Boice*, 345 U. S. 932; *Massey* v. *United States*, 291 U. S. 608; *Sioux Tribe* v. *United States*, 329 U. S. 684, 685; *Farnsworth* v. *United States*, 232 F. 2d 59, 63 (C. A. D. C., 1956); *Waldron* v. *United States*, 146 F. 2d 145, 147-148 (C. C. A. 6, 1944).

The Questions Are Substantial

I.

The State Courts in their denial of rehearing without opinion have, necessarily, implicitly committed one or the other of the following two fundamental errors which give rise to appealable questions: (a) If the denial of rehearing means the State Courts have decided that the Attorney General erred in his representation to this Court to the effect that appellant was entitled to introduce new evidence in his State Court appeals from the contempt conviction, then the State Courts have egregiously denied appellant due process of law because appellant is reasonably entitled to urge that the Attorney General's thus mootedly disapproved representation to this Court may have been instrumental in causing the dismissal of appellant's appeal to this Court, the matter being appealable here anew because it renewedly presents, in aggravated form, the appealable aggrievements presented in the prior appeal. (b) If the State Courts' denial of rehearing does not connote rejection of the Attorney General's representation, i.e., if those Courts believed that the law of New Jersey at the time of appellant's State court appeals from the contempt conviction permitted introduction of new evidence in the State appellate courts, appellant should now have been given that important right in a rehearing, because (1) under the posture of the applicable case law at the time of those appeals it did not reasonably appear that such right ex-

isted, so that appellant's failure to invoke the right at that time should not be held against him; and (2) the granting of the right at this time could have had substantial consequences favorable to appellant in that he would have had an opportunity to establish the defenses of lack of contemptuous intent, justification, good faith, good motivation, truth, etc., and, at least, to show justification for mitigation of punishment—all of which has a critical bearing on his federal constitutional rights which we assert were infringed by the unconstitutional denial of jury trial pursuant to R.R. 3:8.

II.

The New Jersey case law on the issue of the right to introduce new testimony on appeal from a contempt conviction, as that case law stood at the time of the prior proceedings in the State appellate courts and still stands at the present time, would appear to preclude or to becloud seriously the right to introduce such testimony. Due process required that the question be definitively settled by a State court rehearing in this case in view of the representation made by the Attorney General of New Jersey to this Court that the right to introduce such testimony exists in New Jersey. The most clear-cut statement concerning the scope and nature of the statutorily prescribed (N.J.S. 2A:10-3, formerly R.S. 2:15-3; see also R.R. 1:5-2) trial *de novo* procedure on appeal in New Jersey contempt cases is in *Zimmerman* v. *Zimmerman*, 12 N. J. Super. 61, 68-69 (App. Div. 1950), which was cited with approval in *Board of Health, Weehawken Tp.* v. *N. Y. Central R. Co.*, 10 N. J. 284, 293 (1952), and in *Van Sweringen* v. *Van Sweringen* 22 N. J. 440, 450 (1956). The *Zimmerman* bench noted a 1948 statutory change which did away with the 1884 provision for taking original testimony in the appellate courts.

The *Zimmerman* bench also intimated that new evidence might perhaps be taken where the accused had not had a full opportunity to present his side of the case or where a stenographic transcript was not available. However, the predominant impact and doctrinal tendency of the *Zimmerman* case were to negate the right of taking new testimony.

The point next came up for consideration in the *Weehawken Board of Health* case, *supra*, 10 N. J. 284, 292-293, where the Court remarked, in an incidental context, that,

> "* * * today there is full review in the Appellate Division, both on law and facts (R.S. 2:15-3; N.J.S. 2A: 10-3, Rule 1:2-18A), and that court has not hesitated to upset improper contempt convictions. * * *"

In none of the cases cited in the *Weehawken* case as affording examples of the upsetting of improper contempt convictions, was new evidence actually taken during the appeal. The *Weehawken* case must therefore be considered as not having resolved the partial uncertainty created by the *Zimmerman* case.

The next case in which the question was presented was *State* v. *Zarafu*, 35 N. J. Super. 177, 183-184 (App. Div. 1955), where the Court expressly noted the *Zimmerman* ruling that the review was to be a trial *de novo* in the sense laid down in that case (i.e., review on the record) "at least where the accused had a full opportunity to present his side of the case and a stenographic transcript is available." The court in the *Zarafu* case showed itself wholly disinclined to consider any amplification of the record on appeal, and it concluded, emphatically, that the matter should be remanded to the trial court for a full hearing, noting particularly that, "All we have before us is evidence of the apparently contemptuous acts, but nothing

by way of explanation or mitigating circumstances on behalf of defendant."

The last case in which the point appears to have arisen is *Van Sweringen* v. *Van Sweringen*, 22 N. J. 440, 449-450 (1956), reversing 34 N. J. Super. 394 (App. Div. 1955). In the Appellate Division, the Court spoke on the question in a manner indicating that it conceived its function to be to conduct the appellate review on the trial record (34 N. J. Super. at 406), although it appeared also (*id.* p. 403) that a deposition had been taken after the trial of the contempt charges on an issue as to the psychiatric condition of a witness. In the Supreme Court of New Jersey it was expressly noted without disapproval that the Appellate Division had been reluctant to re-evaluate even the trial evidence, but the Court did remark also that the Appellate Division had had before it "further original evidence which it ordered by deposition" (22 N. J. at 449). This last apparently indicates—and it is the only indication which we have found to that effect—that, notwithstanding the limiting principle laid down in the *Zimmerman* case, it did occur in this one instance (in the *Van Sweringen* case) that a New Jersey appellate court apparently did take original evidence in a contempt review proceeding. However, the Supreme Court of New Jersey in the *Van Sweringen* case did not indicate whether it approved this procedure or not. Instead, it propounded a series of difficult queries as to the extent to which the fact-review power of the appellate courts in contempt proceedings may be exercised in the light of the uncertainty as to exactly what is embraced within the concept of a "summary" contempt conviction, the Court's thought being that, under R.R. 1:5-2, the enlarged appellate power of factual review is dependent upon the "summariness" of the conviction involved. These queries in the *Van Sweringen* case (22 N. J. 449-450) were left unresolved.

Viewing all of the cases from *Zimmerman* to *Van Sweringen*, the conclusion seems to be that there is no right to introduce new testimony at the appeals in a criminal contempt proceeding in New Jersey except insofar as the judicial gloss in the *Zimmerman* case and the action taken (but not evaluatingly commented upon) in the *Van Sweringen* case may point to a contrary conclusion. However, we submit that the entire matter is in such a state of uncertainty as to have required definitive clarification, and that such clarification was imperatively indicated in the present circumstances, where the Attorney General's representation to this Court has unjustly disadvantaged appellant in the manner which we have described.

The only authority cited by the Attorney General before this Court to support his assertion that Sarner could have had a full trial *de novo* in the State appellate courts was N. J. Const. 1947, Article VI, §5, par. 3, providing generally for exercise of original jurisdiction on appeal. But the cases from *Zimmerman* to *Van Sweringen* do not refer to this Constitutional provision as having any bearing on the problem.

It would thus appear that appellant's failure to seek the right of introducing new testimony in the State contempt appeals was in accordance with the then most likely meaning of the applicable case law. However, when the Attorney General unequivocally represented to this Court that appellant did have the right to introduce original testimony in the State appellate courts—*and that the right derives from the Constitutional provision as to original jurisdiction, i.e. not from anything in the Zimmerman-Van Sweringen line of cases*—justice required that appellant be granted a rehearing in which full consideration could be given to the question of whether he does indeed possess the right claimed for him by the Attorney General; and if it were decided that appellant does have that right, then in the

rehearing he should be allowed to introduce additional testimony. The nature of the testimony which appellant would so introduce, and the legal and constitutional reasons in support of his right to do so are the subject of our next numbered topic.

We respectfully mention also that if, upon definitive consideration of the question, it should have been decided below that the Attorney General's representation to this Court did not correctly state the law of New Jersey, due process of law under the federal and State Constitutions would have entitled appellant to go again before this Court upon a record unequivocally presenting such a determination as to what the law of New Jersey actually is. Appellant therefore submitted in the unavailing rehearing proceedings below that certification and rehearing should be granted if only for the purpose of so clarifying the posture of the issues with a view to obtaining appropriate federal review of the federal constitutional questions presented—*i.e.*, principally, the question of jury trial. Even if remedial process were denied, appellant prayed, the Supreme Court of New Jersey should have explicitly stated for the record its views as to the status of the law of New Jersey on the question of the right to introduce new evidence in contempt appeals; but, as seen, that prayer was not granted.

III.

If rehearing were granted in the State Appellate Courts, the new evidence which the appellant would seek leave to introduce in the Appellate Division would be pertinent to the issues, and could materially affect the outcome of the case, inasmuch as that evidence would pertain to the defenses of motive, intent, excuse and good faith, and would also go to the question of mitigation of punishment, thereby presenting issues of a constitutional character.

In order to place in its proper setting our contention that a rehearing upon new evidence to be taken by the Appellate Division would substantially affect this case, it is necessary to review certain details of the procedural course of this matter heretofore:

As shown in our "Resumé" treatment in our Jurisdictional Statement in the prior appeal (pp. 14-17), the trial judge in the contempt proceeding denied appellant the right to introduce proofs substantiating his statements as to "perjury", "thievery", etc., in the matrimonial case. The summary denial of jury trial (or, we maintain, of any real trial) was expressly based on the trial judge's oral finding that "no need or purpose would be served, inasmuch as the words on the certification speak for themselves". App. S. Ct., N. J. 20a-32 to 34.* In the appeals from the contempt conviction in the State courts the rejection of appellant's contentions that he had not had a fair trial or adequate hearing was based on a recital in the opinions as to the facts of what transpired at the contempt trial (see our Jurisdictional Statement in the prior appeal herein, pp. 3a to 8a).

Because issues of constitutional fact are involved (*cf. Fay* v. *New York*, 332 U. S. 261, 272) we must mention that that recital was incorrect in several vital respects, to wit, that appellant "undertook to state his defense;" that he "admitted the certification * * * was correct;" that the reason why, after the denial of jury trial the trial judge went on immediately to make his determination of guilt, was that "No further defense [was] tendered by defendant"; and that the interruption of the matrimonial proceedings involved a delay of an entire day. Our "Resumé"

* This refers to the Appendix as cited in the Supreme Court of New Jersey and filed herein in the prior appeal in this Court.

in our prior Jurisdictional Statement (pp. 14-17), shows that all of these findings were incorrect. In addition, see the State Court appellate opinions in our prior Jurisdictional Statement, at p. 7a, where, again, the constitutional facts were incorrectly understood, in that appellant's plea in the contempt trial for the right to present proofs as to the truth of his charges of perjury, etc. was lost sight of behind the emphasis attached to non-proffer by him of the matrimonial trial transcript then and there.

The erroneous impression that appellant conceded the accuracy of the transcript and that no other defense evidence was offered in the contempt proceedings portrays the case as one in which, supposedly, no issue need arise of denial of fair trial because there was nothing to try. The theme connoted by this erroneous impression would run thus: The accuracy of the transcript was admitted, the transcript shows criminal contempt on its face, hence the making of the adjudication of contempt was merely a matter of law for the court. *This theme stands or falls on the question of the correctness of a very important assumption of law, namely, that in the circumstances of this case of criminal contempt the alleged contemnor had no constitutional right to be heard (by a jury or otherwise) on the issues of motive, intent, justification or good faith.* This assumption of law is manifestly wrong.

To begin with, it is to be remembered that appellant was not punished *instanter* as for direct contempt in *facie curiae*, but was tried (*more than three months later*) under an at least ostensible notice-and-hearing procedure, and by a judge who had not personally observed the alleged contempt and had no direct personal knowledge thereof or of the matrimonial proceeding in which it arose. This being so, Sarner became entitled to the constitutional protections accorded to persons tried as for indirect or con-

structive criminal contempt. *Offutt* v. *United States*, 232 F. 2d 69 (C. A. D. C. 1956), cert. den. 351 U. S. 988. See also *Sacher* v. *United States*, 343 U. S. 1, 9-10, and Annotations in 96 L. Ed. 762, 764-765, 93 L. Ed. 578, 580 N. J.

Of specific concern in the present case is the question of the ambit of defenses in criminal contempt trials (the case has become focused upon this topic, through the above-mentioned impression that there was no issue to be "tried" once the transcript of the allegedly contemptuous remarks had been put in evidence and proved or admitted):

1. The general ambit of defenses in a trial for criminal contempt is apparently not discernibly different from that in prosecutions for crime. E.g., *Cooke* v. *United States*, 267 U. S. 517, 536-539; *State* v. *Zarafu*, 35 N. J. Super. 177, 183 (App. Div. 1955).

2. The right of a defendant in a trial for criminal contempt to assert his defenses is founded in constitutional due process. *Cooke* v. *United States*, *supra*; *State* v. *Zarafu*, 35 N. J. Super. 177, 183 (App. Div. 1955).

3. Specifically, the defense of lack of criminal intent, together with related defenses as to motive, good faith, justification, truth, and the like, and, in general, full right to make "defense or explanation", are accorded to defendants in criminal contempt trials. The leading case is *Cooke* v. *United States*, 267 U. S. 517, 536-539. Also see *In re Tiene*, 17 N. J. 170, 180-181 (1954); *State* v. *Zarafu*, 35 N. J. Super. 177, 183 (App. Div. 1955); *In re Singer*, 109 N. J. Eq. 103, 105 (E. & A. 1931).

4. A familiar "intent" defense in criminal contempt for speech or writings is that the words are susceptible of a non-contemptuous interpretation and that such was intended. *Freeman* v. *State*, 188 Ark. 1058, 69 S. W. 2d 267 (1934); *Ex Parte Biggers*, 85 Fla. 297, 95 So. 755 (1923);

La Grange v. *State*, —— Ind. ——, 153 N. E. 2d 593 (1958); *Rosewater* v. *State*, 47 Neb. 630, 66 N. W. 640 (1896); *In re Robinson*, 117 N. C. 533, 23 S. E. 453 (1895); *Board of Supervisors of Hanover County* v. *Bazile*, 195 Va. 739, 80 S. E. 2d 566 (1954). The record in the prior appeal in this Court shows appellant repeatedly attempting to explain that he intended no contempt towards the court but felt impelled to call attention to "truth" concerning conduct of his wife and other persons in the matrimonial litigation. App. S. Ct. N. J. 8a, lines 21 to 24; *Id.*, 13a, line 10; *Id.*, 19a, lines 17 to 21; *Id.*, 20a lines 7 to 9; *Id.*, 21a, line 39, to 22a, line 13; *Id.*, 22a, lines 16 to 28; *Id.*, 31a, line 19, to 32a, line 24.* It is submitted that appellant's alleged contemptuous language (*Id.*, 2a to 3a) was susceptible of being interpreted in accordance with the "truth" explanation just noted, and was not intended as contempt of the court.

5. The defense of lack of criminal intent assumes additional importance in the instant case because New Jersey is one of the state jurisdictions which still recognize an at least qualified right of expurgation by disavowal of contumacious intent. *In re Singer*, 109 N. J. Eq. 103, 105 (E. & A., 1931), expressly preserves the doctrine that "Disavowal of any intention to commit a contempt may, however, extenuate or even purge the contempt." The *Singer* decision is apparently still the law in New Jersey. Earlier New Jersey decisions permit of no doubt that some form of the expurgation doctrine, combined occasionally with a right of defense of justification, long ago became rooted in that State. *In re Cheesman*, 49 N. J. L. 115, 143 (S. Ct. 1886) ("a fair opportunity of denying or confessing [the] truth [of the charges]") (cited with ap-

* See our last preceding footnote, identifying these record references.

proval in *In re Frank*, 135 N. J. L. 429, 432 (Sup. Ct. 1947), which in turn is cited with approval in *In re Tione*, 17 N. J. 170, 180 (1954)); *In re Gonzales*, 88 N. J. L. 536 (S. Ct. 1916); *In re Schmidt*, 88 N. J. Eq. 21, 24 (Ch. 1917). The appellant in this case has thus far been shut off from all opportunity to develop the defensive facts, concerning his intent, that might have obtained for him a purgation or at least a mitigation of sentence under the doctrine above mentioned.

6. Apart from the questions as to the doctrine of expurgation as such, the defense of lack of criminal intent is constitutionally indefeasible because of its bearing on mitigation of punishment. *Cooke* v. *United States*, 267 U. S. 517, 538; *In re Cooley*, 95 N. J. Eq. 485, 487-488 (Ch. 1924), aff'd 103 N. J. Eq. 377 (E. & A. 1928); *In re Hand*, 89 N. J. Eq. 469, 470 (Ch. 1918) (taking into consideration the respondent's "great mental strain" occasioned by a financial setback in the litigation).

7. The specific procedural right which the appellant wanted and was denied in connection with his attempted defense of lack of criminal intent was the right to have the Court consider the transcript in the matrimonial proceeding, where he believed justification would be found for his allegedly contemptuous remarks. See record in prior appeal herein, App. S. Ct. N. J. 19a, lines 16 to 21. *Offutt* v. *United States*, 232 F. 2d 69 (C. A. D. C. 1956), cert. den., 351 U. S. 988. Cf. *Nilva* v. *United States*, 227 F. 2d 74, 78-79 (C. A. 8, 195), reh. den., 228 F. 2d 134, aff'd 352 U. S. 385. If the portions of the matrimonial case transcript which Sarner has all along felt ought to be considered in order to place his conduct in a fairly understood setting were permitted to be introduced in evidence in the Appellate Division *and supplemented by appropriate corroborating proofs*, it is his belief that he would be able to show

that he was so understandably driven to a pitch of strong emotion by the acts of misconduct which he believes were done against him by his wife and certain attorneys in the matrimonial litigation as to give rise to a substantial defense to the contempt charge.

But whether or not the State appellate courts may have considered, in advance of hearing the new evidence which appellant desired to introduce, that such evidence would aid his cause upon rehearing, these courts should nevertheless have granted him the opportunity to present that evidence if it should be concluded that he had the right to do so as a matter of law at the prior state appellate proceedings in this cause and was deterred from doing so by the widespread impression, based on the cases from *Zimmerman* to *Van Sweringen, supra*, to the effect that the right to introduce such evidence on appeal in a contempt proceeding was non-existent or virtually so. Surely, in the face of the very striking contrast between the at least highly equivocal *Zimmerman-Van Sweringen* pattern on the one hand, and the Attorney General's unequivocal representation to this Court on the other hand, the appellant should be afforded every fair opportunity to have considered in all its aspects the question of the introduction of new evidence on appeal in the State courts.

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of New Jersey which was the subject of the prior appeal herein construed and applied R.R. 3:8 so as to deny to the appellant his rights of jury trial, freedom of speech, and adequate notice and hearing in violation of the due process and privileges and immunities clauses of the Fourteenth Amendment. In the prior appeal which this

Court dismissed the reason for the dismissal may well have been that this Court accepted the representation of the Attorney General of New Jersey as to appellant's supposedly having had the right to introduce new evidence in the State appellate courts, thereby obviating wholly or partly the denial of jury trial. The matter raised by the Attorney General's representation being one of State law in the first instance, so that this Court presumably for that reason refrained from going behind such a representation by the Attorney General of a State, such representation may all the more probably have been instrumental in causing this Court to dismiss our prior appeal. It therefore appeared to the appellant to be necessary to go back to the State courts for a determination and clarification as to the actual status of the law of the State on the topic of the Attorney General's representation—it being important to bear in mind that the status of the New Jersey case law on that topic strongly appears to be just the contrary of the status as represented by the Attorney General. The peculiar impact, then, of the Attorney General's representation on the rights of the appellant and on the issues of the prior appeal, taken together with the impact of the total declination of the state courts to afford any relief to the appellant in these premises and indeed even so much as to give any declaration or signification of any kind on the critical and substantial questions presented by appellant's application for rehearing in those courts, are such as to give rise to a new appealable state court judgment which furthermore carries with it, anew, the issues of the prior appeal as well. This last is true, i.e., that the present appeal carries with it the issues of the prior appeal, because, as suggested, this Court's dismissal of the prior appeal may have been occasioned by the Attorney General's representation, so that, if that representation were overborne, the issues of the prior appeal would revive; and

it is believed that the present appeal is the proper instrument for effecting such revival.

We believe that the Federal questions which arise by reason of the foregoing, being properly presented and substantial, entitle the appellant to invoke the jurisdiction of this Court under 28 U. S. C. Sec. 1257 (2). However, appellant respectfully prays that, if this matter be deemed inappropriate for review by appeal, the Court may treat the papers as a petition for a writ of certiorari.

As one final alternative, appellant respectfully prays that the matters presented in this Jurisdictional Statement be treated by the Court as forming a petition for rehearing of the order of May 25, 1959, dismissing our prior appeal, the ground for such petition for rehearing being the intervening developments referred to above in connection with the Attorney General's representation and the action, or non-action, of the State courts in relation thereto. Motion for leave to file such petition for rehearing is printed herewith and follows this Jurisdictional Statement or alternative petition for rehearing. As a second final alternative, appellant respectfully prays that the matters presented in this Jurisdictional Statement be treated by the Court as forming part of a motion to recall and amend the mandate in our prior appeal to remand the case to the Supreme Court of New Jersey for appropriate proceedings to clarify the status of the law of New Jersey in the light of the Attorney General's representation to this Court in the prior appeal, or for the granting of other

appropriate relief to the appellant in the light of that representation. Such motion is printed herewith.

Respectfully submitted,

BACK, NUSSMAN & ROSE,
Attorneys for Appellant,
210 Main Street,
Hackensack, New Jersey.

AARON W. NUSSMAN,
Of Counsel.

(Motion for leave to file petition for Rehearing and motion to recall and amend mandate, follow. Appendix to Jurisdictional Statement follows latter motion.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .

IN THE MATTER
of
SIDNEY SARNER,
Charged with Criminal Contempt,

Appellant.

ON APPEAL FROM FINAL JUDGMENT OF
THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

To the Honourable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Sidney Sarner, the Appellant in the above entitled appeal, which was preceded by No. 803 at the October Term, 1958, in this Court, respectfully says:

As fully set forth in the Jurisdictional Statement which precedes this motion and is printed herewith, intervening circumstances have arisen since the dismissal by this Court of the appeal in No. 803 on May 25, 1959, and the denial of rehearing therein on June 29, 1959. As is also set forth

in the Jurisdictional Statement submitted herewith, those intervening circumstances are believed to be such as to justify the entertaining of a new appeal by this Court, or the treating of the appeal papers as a timely and meritorious petition for a writ of certiorari, or in the alternative as the basis for a petition for rehearing of the aforementioned order of dismissal of the appeal in No. 803.

Wherefore petitioner respectfully moves and prays this Court for leave to file, in the alternative as aforesaid, a petition for rehearing of the said order of dismissal of the appeal in No. 803, October Term, 1958, using as the papers for such petition for rehearing the Jurisdictional Statement submitted herewith and the papers submitted with said Jurisdictional Statement.

Respectfully submitted,

BACK, NUSSMAN & ROSE,
Attorneys for Appellant,
210 Main Street,
Hackensack, New Jersey.

AARON W. NUSSMAN
Of Counsel.

Certificate of Counsel in Support of Petition for Rehearing

I hereby certify that the within petition for rehearing is presented in good faith and not for delay. While I am uncertain as to the applicability of paragraph 2 of Rule 58 to the within petition for rehearing, I hereby certify that, if the said provision of the Rules is applicable hereto, the within petition for rehearing is restricted to the grounds specified in the said paragraph 2 of Rule 58.

AARON W. NUSSMAN,
Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. _____

IN THE MATTER
of
SIDNEY SARNER,
Charged with Criminal Contempt,

Appellant.

ON APPEAL FROM FINAL JUDGMENT OF
THE SUPREME COURT OF NEW JERSEY

MOTION TO RECALL AND AMEND MANDATE

To the Honourable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Sidney Sarner, the Appellant in the above entitled appeal, which was preceded by No. 803 at the October Term, 1958, in this Court, respectfully says:

As fully set forth in the Jurisdictional Statement which precedes this motion and is printed herewith, intervening circumstances have arisen since the dismissal by this Court of the appeal in No. 803 on May 25, 1959 and the denial of rehearing therein on June 29, 1959. As is also set forth

in the Jurisdictional Statement submitted herewith, those intervening circumstances are believed to be such as to justify an order recalling the mandate to amend it as follows: To remand the case (No. 803, October Term, 1958) to the Supreme Court of New Jersey for appropriate proceedings to clarify the status of the law of New Jersey in the light of the representation by the Attorney General of New Jersey in his motion to dismiss the appeal in No. 803, October Term, 1958, which representation was to the effect that appellant Sidney Sarner was entitled, in his state court appeals for his contempt conviction, to introduce new evidence; or for appropriate proceedings for the granting of other appropriate relief to the appellant in the light of the said representations of the Attorney General. Cf. *Cahill* v. *N. Y., N. H. & H. R. Co.*, 351 U. S. 183; *United States* v. *Reading Co.*, 228 U. S. 158; *Gaines* v. *Rugg*, 148 U. S. 228; *Albany County* v. *Stanley*, 105 U. S. 316.

Wherefore, appellant-movant respectfully moves this Court to recall and amend the mandate in No. 803, October Term, 1958, in the manner hereinbefore prayed for.

Respectfully submitted,

Back, Nussman & Rose,
Attorneys for Appellant,
210 Main Street,
Hackensack, New Jersey.

Aaron W. Nussman,
Of Counsel.

APPENDIX A

Order Denying Application for Stay of Warrant of Commitment and for a Relaxation of Time for Filing Petition for Rehearing.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-354-57

JULIA SARNER,

Plaintiff.

vs.

SIDNEY SARNER,

Defendant.

IN THE MATTER

of

SIDNEY SARNER.
Charged with Criminal Contempt,

Appellant.

CIVIL ACTION

ON MOTION TO STAY WARRANT OF COMMITMENT
OF THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

Application having been made by Sidney Sarner to this court for a stay of the warrant of commitment committing

Order Denying Application for Stay of Warrant of Commitment and for a Relaxation of Time for Filing Petition for Rehearing

him to the Hudson County Jail to serve a term of 60 days for a contempt of court, criminal in nature, and for a relaxing of the rules of this court governing petitions for rehearing; and the court having read and considered the petition of the said Sidney Sarner and the brief in support thereof together with the answer filed by the attorney designated by the court to appear for it in this proceeding, and the court being of the opinion that the said application is without merit and should be denied:

It is, on this 31st day of July, 1959, ORDERED that the application of the said Sidney Sarner be and it is, in all things, denied.

FOR THE COURT

SIDNEY GOLDMANN
S. J. A. D.

Order Denying Rehearing and Application for a Stay

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-354-57

JULIA SARNER,

Plaintiff,

vs.

SIDNEY SARNER,

Defendant.

IN THE MATTER

of

SIDNEY SARNER,
Charged with Criminal Contempt,

Appellant.

CIVIL ACTION

ON MOTION TO STAY WARRANT OF COMMITMENT
OF THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

The court having heretofore, and on July 31st, 1959, denied an application by Sidney Sarner for a rehearing of this proceeding and a relaxation of the rules as to the time for the filing of a petition for a rehearing, and the said Sidney Sarner having filed a petition asking for a further rehearing of the application denied by the order of

Order Denying Rehearing and Application for a Stay

July 31st, 1959, and also for a stay of the warrant of commitment, and the court having read the said petition and being of the opinion that the same is without merit and should be denied;

It is, on this 3rd day of September, 1959, Ordered that the petition for a rehearing of the application denied by the order of this court entered on July 31st, 1959, and for a stay of the warrant of commitment, be and the same is hereby denied and a warrant of commitment of the said Sidney Sarner is directed to be issued forthwith that the sentence of the court may be carried out.

For the Court

By: Sidney Goldmann
Senior Judge

I hereby certify that the foregoing is a true copy of the original on file in my office.

I. Grant Scott
Clerk

Order Denying Petition for Certification to the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

IN THE MATTER

of

SIDNEY SARNER,
Charged with Criminal Contempt.

ON PETITION FOR CERTIFICATION
ORDER DENYING PETITION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton on the twenty-ninth day of September, 1959.

JOHN H. GILDEA
Clerk of the Supreme Court

A True Copy:

JOHN H. GILDEA
Clerk

FILED
Sep 29 1959

JOHN H. GILDEA
Clerk

Order Denying Motion for Stay to the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

IN THE MATTER

of

SIDNEY SARNER,

ON MOTION FOR STAY.

This matter having been duly presented to the Court, it is Ordered that the motion for stay is denied.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this twenty-ninth day of September 1959.

JOHN H. GILDEA
Clerk

A True Copy
JOHN H. GILDEA
Clerk

FILED
Sep 29 1959

JOHN H. GILDEA
Clerk

Warrant of Commitment

THE STATE OF NEW JERSEY to THE SHERIFF OF THE COUNTY OF HUDSON and THE KEEPER OF THE COMMON JAIL OF THE COUNTY OF HUDSON, or to any peace officer to whom this warrant shall come,

(SEAL)

GREETING: WHEREAS, Sidney Sarner, was heretofore convicted in the Superior Court of New Jersey, Chancery Division, Bergen County, of a charge of a contempt of the said court, criminal in nature, and thereafter appealed to the Appellate Division of the Superior Court from the said judgment of conviction, which court did, on September 17th, 1958, affirm the said judgment of conviction and imposed a sentence that the said Sidney Sarner serve a term of 60 days in the Hudson County Jail; and

WHEREAS, The said Sidney Sarner appealed from the said judgment of conviction to the Supreme Court of the State of New Jersey, which said court did on January 5th, 1959, affirm the said judgment of conviction; and

WHEREAS, The said Sidney Sarner thereafter appealed to the Supreme Court of the United States, which said court declined to review the said conviction; and

WHEREAS, the said Sidney Sarner thereafter applied to the Appellate Division of the Superior Court of New Jersey for a rehearing of the said judgment of conviction, which said application was denied by an order entered on July 31st, 1959, and the said Sidney Sarner, therefore, must serve the said term of 60 days in the Hudson County Jail, pursuant to the order of the Appellate Division of the Superior Court of New Jersey;

Warrant of Commitment

THESE ARE, THEREFORE, TO AUTHORIZE AND DIRECT YOU to take the said Sidney Sarner into custody and deliver him to the Keeper of the Hudson County Jail, who shall receive the body of the said Sidney Sarner and keep him confined in the said Hudson County Jail, pursuant to law, for the term of 60 days, and for so doing this warrant of commitment shall be sufficient justification and authority.

And you are to make return to the Superior Court of New Jersey, at Trenton, on the 5th day of October, 1959, under your hand, and of your doing in the premises, together with this writ.

WITNESS, HIS HONOR SIDNEY GOLDMANN, SENIOR JUDGE of the Appellate Division, Superior Court, the 4th day of September, 1959.

James A. Major, Attorney.

I. GRANT SCOTT
Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 490

IN THE MATTER
of
SIDNEY SARNER,
Charged With Criminal Contempt,
Appellant.

ON APPEAL FROM FINAL JUDGMENT OF
THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for and of Counsel with Appellee,
State House Annex,
Trenton, New Jersey.

MORTON I. GREENBERG,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

Statement of Questions Involved

1. May this Court note probable jurisdiction on an appeal from a State Supreme Court when the record shows that the decision was based on adequate non-federal grounds and there was no substantial federal question before the state courts?

2. May this Court note probable jurisdiction on an appeal from a State Supreme Court when the issues are moot?

Pursuant to Rule 16(1) of the Revised Rules of this Court, David D. Furman, Attorney General of New Jersey, moves that this appeal be dismissed on the grounds that there is a want of a substantial federal question properly advanced or expressly passed upon in the State courts and that the judgment rests on an adequate non-federal basis.

Statement of the Case

This is the second appeal from the Supreme Court of New Jersey in this case, the first appeal having been dismissed on motion of the Attorney General. 359 U. S. 533 (1959). A petition for rehearing was also denied. 360 U. S. 940 (1959).

Since the facts have been presented to the Court on the previous appeal they will only be summarized here. On November 7, 1957, during the course of a matrimonial action involving the appellant and his wife in the Superior Court of New Jersey, Chancery Division, Judge WILLIAM A. HEGARTY indicated that judgment for separate maintenance would be entered for his wife. On December 3, 1957, a hearing was held before Judge HEGARTY to ascertain if the appellant were able to pay alimony and counsel fees. At the hearing the appellant, evidently upset at the determination awarding separate maintenance, issued a verbal attack at Judge HEGARTY. (Appendix of the Appellant in the Appellate Division, 7a-10 to 8a-25 (hereinafter cited as "Apx").) Sarner then refused to respond to certain questions (Apx 8a-35 to 42). As a result of this conduct his wife's attorney moved that he be cited for contempt (Apx 7a-18 to 38). On March 6, 1958, Judge HEGARTY certified to the Assignment Judge of Bergen County that the appellant had committed a contempt before him (Apx 2a to 4a). This action was in obedience to the rules of that court, "The Revision of the Rules Governing the Courts of the State of New Jersey" (hereinafter cited as R.R.) which disqualify a trial judge from presiding at hearings on charges of contempt arising from disrepect or criticism of himself. R.R. 4:87-2(d). On March 10, 1958, Superior Court Judge J. WALLACE LEYDEN issued an order for the appellant to show cause on March 27, 1958, why he should not be adjudged guilty of contempt (Apx 1a). On March

27, 1958, the matter was heard by Superior Court Judge DAVID A. NIMMO (Apx 11a to 24a). A transcript of the hearing at which the contempt had been committed was made part of the record before Judge NIMMO. The appellant in open court conceded its accuracy (Apx 18a-12 to 19a-21), and though offering no evidence against the charge of contempt, demanded a jury trial (Apx 20a-29). While Judge NIMMO had discretion to honor this request he denied it because in view of the admission concerning the accuracy of the transcript he had no questions of fact to resolve (R.R. 4:87-3; Apx 20a-30 to 40). Judge NIMMO thereupon found the appellant guilty and sentenced him to 60 days in the Hudson County Jail (Apx 25a).

An appeal was taken to the Appellate Division of the Superior Court which entered judgment on September 17, 1958, affirming the action of the Chancery Division. Thereafter the matter was appealed to the Supreme Court of New Jersey but that Court affirmed the judgment of the Appellate Division. 28 N. J. 519, 147 A. 2d 244 (1959).

A further appeal was then prosecuted to this Court but a motion to dismiss it was made by the Attorney General. The brief in support of the motion of the Attorney General contained the following statement:

> "Though both appeals were tried on the record had the appellant desired to introduce new evidence he could have sought leave to do so since the New Jersey Constitution gives the Appellate Division and the Supreme Court such original jurisdiction as is necessary to dispose of any case before it. *New Jersey Constitution of 1947*, Art. VI, § 5, par. 3; *State* v. *Ferrell*, 29 N. J Super. 183, 102 A. 2d 70 (App. Div. 1954); see *Coleman* v. *Newark Morning Ledger Co.*, 29 N. J. 357, 149 A. 2d 193 (1959)."

Subsequently the appellant filed a reply brief in this Court opposing the motion. On page 15 of the reply brief the appellant declared:

> "The Attorney General's suggestion (Mot. p. 9) that appellant could have introduced new evidence in the state appellate courts ignores *Zimmerman* v. *Zimmerman*, 12 N. J. Super. 61, 69 (App. Div. 1950), cited in our Jurisdictional Statement, p. 23. Even more conclusive against the Attorney General's suggestion is *State* v. *Zarafu*, 35 N. J. Super. 177, 183-184 (App. Div. 1955). In any event, '* * * even at its rare best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge.' *Green* v. *United States*, 356 U. S. 165, 200 (dissenting op.)."

This Court thereupon granted the motion and dismissed the appeal, 359 U. S. 533 (1959), and subsequently denied a rehearing. 360 U. S. 940 (1959).

The appellant then applied to the Superior Court of New Jersey, Appellate Division, for leave to file a petition for rehearing, asserting the Attorney General's alleged misrepresentation. On July 31, 1959, the application was denied, the Appellate Division refusing to entertain the petition, it being out of time. This motion was renewed on August 20, 1959, but on September 3, 1959, the Appellate Division once more refused to relax the rules and entertain the petition. See Appendix to Jurisdictional Statement 3a to 4a (hereinafter cited as "Appendix"). The appellant then petitioned the Supreme Court of New Jersey for certification to review the action of the Appellate Division but on September 29, 1959, the petition was denied (Appendix 5a). From that denial this appeal is prosecuted.

The appellant makes no argument not advanced on his first appeal. Principally he wrongfully contends that the Attorney General in the prior appeal indicated that he had a right to introduce new evidence before the Appellate Division and that the New Jersey courts have denied him that right. But the Attorney General made no such representation. Rather he only indicated that the appellant could have "sought leave" to introduce new evidence in the Appellate Division. Further he advanced these contentions on his previous appeal in his brief in opposition to the Attorney General's motion. The appellant has now served his sentence for contempt, being released on November 16, 1959.

ARGUMENT

The decision of the Supreme Court of New Jersey rests on three adequate non-federal grounds; thus this Court has no jurisdiction on this appeal. *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449 (1958); *Woods* v. *Nierstheimer*, 328 U. S. 211 (1946). Firstly, the application seeking leave to file a petition for rehearing was out of time under the New Jersey rules. The petition in the Appellate Division was filed on July 14, 1959. The rules of that Court require that petitions for rehearing be made within 10 days from the date of its final judgment. R.R. 1:9-4; R.R. 2:9-2. Its final judgment had been entered on September 17, 1958 and the petition was denied on this ground.

Second, as the appellant points out in his jurisdictional statement, the application seeking a rehearing from the Appellate Division was made in order that he might present new evidence. But he had had ample opportunity to seek leave to present evidence to the Appellate Division on his first appeal. Hence he failed to assert this alleged right in a timely manner. Thirdly, the appellant, even if he had

timely presented a federal constitutional issue to the Appellate Division, by petitioning the Supreme Court of New Jersey for certification from the Appellate Division has foreclosed this Court from considering this appeal on the merits. Certification is discretionary with the Supreme Court of New Jersey in the same way that certiorari is discretionary with this Court. R.R. 1:10-2. But Article VI, Sec. V, paragraph 1 of the New Jersey Constitution of 1947 provides that appeals of right may be taken to the Supreme Court "In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State." See also R.R. 1:2-1. Though the appellant claims to present this Court with a federal constitutional question, by petitioning the Supreme Court of New Jersey for certification he invited that Court to refuse to pass upon the question notwithstanding the fact that on his own theory he could have required the Supreme Court of New Jersey to hear it. The invitation having been accepted, it is clear that the appellant has failed to exhaust his State remedies and has not preserved the rights now advanced (Appendix 5a). See 28 U. S. C. §1257(2), quoted below.

Further, there is no substantial federal question raised by this appeal. Jurisdiction is sought to be found under 28 U. S. C. §1257(2) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Yet, a reading of the jurisdictional statement makes plain that the appellant is really appealing from the Attorney General's allegedly false representations to this Court on the prior appeal. See Jurisdictional Statement, pp. 9-10. But he made the same point to this Court on the prior appeal but yet this Court refused to note jurisdiction. And both New Jersey courts have deemed the argument without enough merit to cause them to rehear this case. Further there was no misrepresentation. In his jurisdictional statement (p. 10) the appellant declares:

> "(a) In the aforesaid prior appeal in this Court the Attorney General of the State of New Jersey represented to this Court in his motion to dismiss said appeal that under the law of New Jersey the appellant was entitled to introduce new evidence in the Supreme Court of New Jersey and in the Superior Court, Appellate Division, in the proceedings for review of his conviction for contempt."

But nothing in the Attorney General's brief on the prior appeal indicated that the appellant had a "right" or was "entitled" to introduce new evidence. Rather the brief declared that the appellant "could have sought leave to" introduce new evidence. In short this appeal presents no issues not already adversely determined to the appellant on his first appeal to this Court. Manifestly it amounts to nothing more than another petition for rehearing.

Finally, inasmuch as the appellant has completed serving his sentence the appeal is moot and must be dismissed. *St. Pierre* v. *United States*, 319 U. S. 41 (1943) is controlling on this point. There a writ of certiorari allowed to review a criminal contempt conviction was dismissed because the sentence had been served. The court said:

"We are of opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the term of imprisonment which he has served." 319 U. S. at 42-43 (omitting citations).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

David D. Furman,
Attorney General of New Jersey,
Attorney for and of Counsel with Appellee.

Morton I. Greenberg,
Deputy Attorney General,
On the Brief.